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In The

Supreme Court of the United States

October Term, 1977

No. 77-25

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated, THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Respondents.

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

Page

Introductory Statement 1

Argument:

I. There is no requirement that a decision of the Court of Appeals must be final in terminating an action in order that it be reviewable by the Supreme Court by writ of certiorari. 2

II. The judgment of the Court of Appeals below meets the controlling test for granting review by certiorari.. 6

Conclusion 10

TABLE OF CITATIONS

Cases Cited:

Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464 (1947) . 4

American Construction Co. v. Jacksonville T. and K.W. Ry., 148 U.S. 372 (1893) 3

Bolling v. Sharpe, 347 U.S. 497 (1954) 9

Brooks v. Flagg Brothers, Inc., 404 F. Supp. 1059 (S.D.N.Y. 1975) 9

Brooks v. Flagg Brothers, Inc., 553 F.2d 764 (2d Cir. 1977). 9

Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Rd., 389 U.S. 327 (1967) 6

Page

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) ... 6

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 5

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 . 6, 7

Conley v. Gibson, 335 U.S. 41 (1957) 9

Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc., 354 F.2d 356 (8th Cir. 1977) 8

Denver v. New York Trust Co., 229 U.S. 123 (1913) 3

Eisen v. Carlisle & Jacquelin, 414 U.S. 908 (1973), 417 U.S. 156 (1974) 5

Forsyth v. Hammond, 166 U.S. 506 (1897) 4

Fuentes v. Shevin, 407 U.S. 67 (1972) 9

Gay v. Ruff, 292 U.S. 25 (1934) 3, 4

Gillespie v. United States Steel Corp., 379 U.S. 148 (1964). 6

Green v. Van Buskerk, 70 U.S. 448 (1886) 2

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 252 (1916) 6

Melara v. Kennedy, 541 F.2d 802 (1976) 8

Svendsen v. Smith's Moving & Trucking Co., No. 77 N 2863 HFW (S.D.N.Y. filed 6/13/77) 9

Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923) 6

Page

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 3

Statutes Cited:

28 U.S.C. §1254 ..... 3, 5

28 U.S.C. §1254(1) 2, 4, 5

28 U.S.C. §1447(d) 4

28 U.S.C. §§1291-1292 5

42 U.S.C. §1983 8

N.Y.U.C.C. §7-210(2) 7

Circuit Court of Appeals Act of 1891 (Ch. 517, 26 Stat. 826). 4

United States Constitution Cited:

Fourteenth Amendment 8

Rule Cited:

Fed. R. Civ. P. 23 8

Other Authorities Cited:

9 J. Moore, "Federal Practice", par. 110.08(2) at 119 (2d Ed. 1953) 2

Reviser's Note, 28 U.S.C.A., "Judiciary and Judicial Procedure §§1251 to 1291" at 30 (West 1960) 3

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BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

INTRODUCTORY STATEMENT

Petitioners, FLAGG BROTHERS, INC., and HENRY FLAGG, submit this brief in reply to the brief submitted by respondents, SHIRLEY HERRIOTT BROOKS and GLORIA JONES, opposing the petition for writ of certiorari filed by petitioners in No. 77-25.

ARGUMENT

I.

There is no requirement that a decision of the Court of Appeals must be final in terminating an action in order that it be reviewable by the Supreme Court by writ of certiorari.

In their brief to this Court respondents urge that certiorari be denied due to nonfinality of the decision of the Court of Appeals below.

As respondents concede, however (Brief for Respondents in Opposition, 8-9), there is no statutory requirement of finality when certiorari is sought to review a judgment of the United States Court of Appeals. The controlling statute, 28 U.S.C. §1254, Subs. (1), makes this expressly clear, providing:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, *before or after rendition of judgment or decree;* . . . ." (Emphasis added.)

A judgment is not final until entered in the court docket, *Green v. Van Buskerk,* 70 U.S. 448; 9 J. Moore, "Federal Practice", par. 110.08(2) at 119 (2d Ed. 1953). In authorizing issuance of the writ of certiorari even before the Court of Appeals has rendered its judgment, and, *a fortiori,* before an announced judgment has been entered in the Court of Appeals docket so as to become final, it is clear that the statute contemplates and allows Supreme Court review of a case by certiorari before a final decision of the Court of Appeals.

That nonfinality is no bar to the Court's review, no matter

what the stage of litigation, is demonstrated by the history of §1254 and by cases interpreting it. An earlier version of Subsection (1) of §1254 contained the following additional provisions, omitted in subsequent revisions:

> ". . . with the same power and authority and with like effect, as if the cause had been brought there by *unrestricted* writ of error or appeal." (Emphasis added.)

See *Gay v. Ruff,* 292 U.S. 25, 31 n. 7 (1934). The term "unrestricted" is also used in the "Revisor's Note" to 28 U.S.C. §1254, 28 U.S.C.A., "Judiciary and Judicial Procedure §§1251 to 1291" at 50 (West 1960):

> "The effect of subsections (1) and (3) of the revised section is to preserve existing law and retain the power of *unrestricted* review of cases certified or brought up on certiorari. Only in subsection (2) is review restricted." (Emphasis added.)

Thus, in *American Construction Co. v. Jacksonville, T. and K.W. Ry.,* 148 U.S. 372 (1893), the very case quoted by the respondents in support of applicability of the finality rule to the Court's power to grant certiorari (Brief in Opposition, 9-10),[1] the Court said, at 148 U.S. 385:

> "There is nothing in the act to preclude this court from ordering the whole case to be sent up . . . at

1. The passage of the decision quoted by respondents had reference only to interlocutory orders granting or continuing an injunction. On this same basis can be distinguished other cases cited by respondents which concern themselves with the equitable jurisdiction of the court of first resort to grant an injunction rather than with the appellate powers of the Court of last resort to supervise the uniform administration of justice in the federal judiciary. See *Denver v. New York Trust Co.,* 229 U.S. 123 (1913); *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

as early a stage as when such questions have been so certified.

* * *

(T)he question at what stage of the proceedings, and under what circumstances the case should be required, by certiorari or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require."

The Court was even more emphatic in *Forsyth v. Hammona* 166 U.S. 506, 513 (1897), in interpreting the provision of the Circuit Court of Appeals Act of 1891 (Ch. 517, 26 Stat. 826) that eventually became §1254, Subsection (1):

"Unquestionably, the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to rest in this Court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the Court of Appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein. All that is essential is that there be a case pending in the Circuit Court of Appeals, ..."

A good illustration of this "comprehensive power" conferred upon the Supreme Court to issue writs of certiorari is provided by *Gay v. Ruff, supra,* 202 U.S. at 29-31, and *Aetna Casualty & Surety Co. v. Flowers,* 330 U.S. 464, 467 (1947), wherein the Court held that a provision of the Judiciary Code, now codified at 28 U.S.C. §1447(d), declaring nonappealable a Federal District Court order remanding a case to a state court from which it was removed, did not limit or restrict the Supreme Court's "extensive" power under what is now §1254(1) to review such an order on writ of certiorari.

The sweeping language of the cases interpreting §1254 and recognizing the Supreme Court's power to review at any stage it deems appropriate is illustrated in *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974). In that case, which in an eight-year history had never been tried, had been appealed to the Court of Appeals three times after being twice in the District Court, and which presented to the Supreme Court a distinctly nonfinal order of the Court of Appeals denying class action status, the Supreme Court granted certiorari. 414 U.S. 908 (1973).

In its decision on the merits of the *Eisen* appeal, the Court did treat the finality rule, but only in reference to the appellate jurisdiction of the Court of Appeals below to review the District Court's orders. *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. at 169-172. Likewise, in the passages of Professor Moore's treatise on federal practice cited by respondents on page 8 of their brief, the "dominant final judgment rule" is discussed, but only in reference to the appealability of decisions of the Federal District Courts to the Courts of Appeals under 28 U.S.C. §§1291 and 1292. Section 1291's express statutory requirement of finality of the District Courts' decisions, in order to be reviewable by the Courts of Appeals, with exceptions as to certain interlocutory orders set forth in §1292, is not to be found in §1254(1) governing the Supreme Court's power of review over decisions of the Courts of Appeals.

It is petitioners' position that this omission is deliberate and that there is no requirement of finality of a Court of Appeals decision in terminating an action in order for it to be reviewable by writ of certiorari. See *City of New Orleans v. Dukes,* 427 U.S. 297, 301-302 (1976). Respondents have cited no precedent to support the Court's refusal to exercise its jurisdiction under §1254(1) simply and solely because the Court of Appeals decision sought to be reviewed herein is not final in remanding other, unresolved issues to the District Court.

Most of respondents' "final judgment" cases and

authorities are totally inapposite, not being concerned with the appellate jurisdiction of the Supreme Court over the Courts of Appeals. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 252, 258 (1916) and *Brotherhood of Locomotive Firemen and Enginemen v. Bangor E. Aroostook Rd.*, 389 U.S. 327 (1967) merely recognize the Supreme Court's discretion to grant or deny petitions for certiorari.[2] These cases are only authority that the Court can refuse a writ on nonfinality grounds, not, as respondents contend, that it must or should do so. "Our power to grant writs of certiorari extends to interlocutory as well as final decrees," *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 410 (1923) (per Taft, C.J.).

Whether the Court should grant petitioners' writ to review the nonfinal judgment of the Court of Appeals below depends upon the considerations discussed in Point II of petitioners' brief, *infra*.

II.

The judgment of the Court of Appeals below meets the controlling test for granting review by certiorari.

The question of what is a final judgment does not turn upon whether there are any substantial federal questions remaining to be decided by the courts below. Rather, the Supreme Court has called for more of a "pragmatic approach" to the question, *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962), in which the "requirement of finality is to be given a practical rather than a technical construction." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-153; *Cohen v. Beneficial*

2. In *Hamilton-Brown Shoe Co.* the writ was denied, not only because the Court of Appeals decree was nonfinal, but also and equally because it "involved no question of public interest and general importance, nor any conflict between the decisions of state and Federal courts, or between those of Federal courts of different circuits." 240 U.S. at 258. Such questions and conflicts, however, are in the instant case, as brought out in the petition for certiorari at 5-10.

Industrial Loan Corp., 337 U.S. 541, 546. In *Gillespie*, this Court said:

> "Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511, pointed out that in deciding the question of finality the most important competing considerations are 'the inconvenience and costs or (sic) piecemeal review on the one hand and the danger of denying justice by delay on the other.'"

The instant case fits exactly within the *Gillespie* mold. As was noted there, petitioners' case is now before the Court. Denial of the instant petition will result in incurring substantial costs and efforts in litigating the case in the District Court and in the Court of Appeals in order to be able to return to this Court. On the other hand, a determination of the threshold question of state action at this time may be dispositive of the case. If state action does not exist then all of the remaining issues are academic and the time, expense and burden on the court system by following the circuituous course urged by respondents would be wasted. If state action is present, a finding by this Court at this time would simplify the work of the courts and the parties on the remand. Review at this juncture thus comports with the pragmatic and practical approach discussed in the cases.

An equally compelling reason for granting certiorari is that delay in resolution of the state action issue will result in a denial of justice by perpetuating the present irreconcilable conflict on the legality of the warehousemen's right of summary lien sale pursuant to Uniform Commercial Code §7-210(2). Under the current case law prevailing in states subject to the jurisdiction of the Court of Appeals for the Ninth Circuit, household goods warehousemen may engage in summary sale of storage lots to satisfy unpaid charges, without any prior judicial intervention. *Melara v. Kennedy*, 541 F.2d 802 (9th Cir. Aug. 2, 1976), *reh.*

and reh. en banc denied (Oct. 8, 1976). But in those states subject to the jurisdiction of the Court of Appeals for the Eighth Circuit household goods warehousemen engaging in this collection practice would be liable in damages for conversion and also under the Civil Rights Act, 42 U.S.C. §1983, for violation of the depositor's federal constitutional right of due process. *Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.*, 354 F.2d 356 (8th Cir. May 12, 1977), *reh. denied* (June 9, 1977). As for the states subject to the jurisdiction of the Court of Appeals below, household goods warehousemen may proceed to sale but are apprehensive to do so in light of the pendency of the instant challenge to the lien sale statute, particularly since they may become defendants in the action by their inclusion in a defendant class certified under Fed. R. Civ. P. 23.

Throughout the rest of the country household goods warehousemen are in a state of limbo, having the right to sell but reluctant to proceed until there has been a dispositive decision resolving the conflicts among the circuits on the state action issue. It is unjust for both the warehousemen and the public they serve to be afforded different and opposing rights with regard to the disposition of household property depending upon where they live. As the ultimate interpreter of the federal Constitution and laws, the Supreme Court should immediately rectify this anomaly. The reasons why this Court should grant certiorari to resolve the conflict among the circuits equally support the necessity for resolving the conflict at the earliest possible opportunity.

Further, a refusal to grant certiorari on finality grounds would deny justice to all those persons who, between the denial of certiorari and any later time when certiorari may be granted and the issue finally decided in petitioners' favor, bring an action under the Civil Rights Act and the Fourteenth Amendment, relying upon the novel theory of state action propounded by the

Second Circuit.[3] Already at least one such case, involving the identical same challenge to the statute under attack here, has been instituted. *Svendsen v. Smith's Moving and Trucking Co.*, No. 77 N 2863 HFW(S.D.N.Y. filed 6/13/77). Justice will be denied to these parties, including plaintiffs who will have gone to the trouble and expense of bringing the actions and defendants who will have been compelled to defend them, by delaying the review and reversal of the Second Circuit's ruling on this important and difficult constitutional law question. *Cf. Bolling v. Sharpe*, 347 U.S. 497 (1954).

Opposing respondents are incorrect in contending that the validity of the contract between the parties, authorizing the warehouseman to sell the plaintiff's goods in default of payment, has not been passed upon below (Brief in Opposition, 18-19). The District Court held that it did not matter whether or not the contractual agreement entered here was valid, as absence of state action was overriding. *Brooks v. Flagg Brothers, Inc.*, 404 F. Supp. 1059, 1066-67 (S.D.N.Y. 1975) (Petition for Certiorari, Appendix, 41a-42a). The Court of Appeals concluded that the contract between plaintiff BROOKS and the petitioners was invalid, under *Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972), and accepted plaintiff JONES' allegation in her complaint, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that she never had any agreement on the storage of the goods. *Brooks v. Flagg Brothers, Inc.*, 553 F.2d 764 (2d Cir. April 7, 1977) (Petition for Certiorari, Appendix, 9a, n. 3). Thus, there is no need for class determinations to resolve a matter which the courts below have resolved.

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3 The concept that the Legislature's conferral of dispute-resolving authority upon private parties constitutes state action had its genesis in the Second Circuit in two prior dissenting opinions of Chief Judge Irving Kaufman, which the court below adopted and elevated to the rule of the circuit. *Brooks v. Flagg Brothers, Inc.*, 553 F.2d 764, 771 (2d Cir. April 7, 1977) (Petition for Certiorari, Appendix, 18a).

CONCLUSION

The technical lack of finality of the decision of the Court of Appeals below is not a bar to Supreme Court review by certiorari. The Supreme Court has indicated in its past decisions a willingness to review nonfinal decisions on issues which are fundamental to the further conduct of the case. Whether the Court will exercise its discretion to review such an issue in a particular case depends on practical considerations of the interests of justice and the convenience and costs of litigation to the parties and the courts.

Under these considerations, the decision of the Court of Appeals below, finding state action present in a warehouseman's sale of stored household goods pursuant to statute, is immediately reviewable by the Court and should be reviewed. The petition in No. 77-25 for issuance of writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
September 6, 1977

Respectfully submitted,

s/ Alvin Altman

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